NO. SC86035

IN THE SUPREME COURT OF MISSOURI

ERIC HUMPHREY,
Plaintiff/Respondent,

v.

CHARLES GLENN and
DALE GLENN d/b/a
C & D GLENN FARM
Defendants/Appellants.

APPEAL FROM THE CIRCUIT COURT OF
MISSISSIPPI COUNTY, MISSOURI
33RD JUDICIAL CIRCUIT
HONORABLE DAVID A. DOLAN, CIRCUIT JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

FRED H. THORNTON, III #43315
THORNTON LAW FIRM
Attorneys at Law
113 West North Street, P. O. Box 40
Sikeston, MO 63801
Telephone: (573) 471-1207
Fax: (573) 471-1050
Attorneys for Respondent

ORAL ARGUMENT REQUESTED BY APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case, Statute, Rules or Other Authority

JURISDICTIONAL STATEMENT

This is an action on transfer from the Missouri Court of Appeals Southern District. This action is an appeal from a judgment entered on a jury verdict on a premises liability claim in the Circuit Court of Mississippi County by the Honorable David A. Dolan. (L.F. 79-80) The jury entered a verdict for Plaintiff, awarding $100,000.00 damages and assessing 50% fault to the Defendant and 50% fault to the Plaintiffs. (L.F. 76) The trial court overruled the Defendants' post-trial motions and Defendants filed their appeal. (L.F. 5-6; 117-126) The issues for appeal involve the sufficiency of the evidence and instructional error in the verdict directing instruction.

This appeal is upon Order of Transfer by the Supreme Court of Missouri dated June 22, 2004. This appeal does not involve the construction of the Constitution of the State of Missouri, the validity of a present statute of this State, nor the construction of a revenue law.

STATEMENT OF FACTS

The Appellant's Statement of Facts are incomplete, and the Respondent is not satisfied with Appellant's Statement of Facts. Therefore, pursuant to Missouri Supreme Court Rule 84.04(f), Respondent submits the following Statement of Facts.

On October 7, 2000, Plaintiff, Eric Humphrey, was clotheslined by a wire cable while driving his ATV four-wheeler. (Tr. 144, 156, 157, 110, 69, 83, 86) The wire cable was hung across a farm road owned by Burke Dodson. (Tr. 191; 23) The farm road in question was identified as the "South Entrance to Greenfield". (Tr. 19, 23, 124; App. A7-A8) Greenfield was being leased and farmed by the Defendants and was under Defendants' control. (Tr. 23, 124) Greenfield had two entrances: a North entrance and South entrance. (Tr. 19) Each entrance has a wire cable installed by Appellants to keep trespassers out of Greenfield. (Tr. 126, 127; App. A6-A9) The wire cable blocking the South entrance road was hung between two trees and anchored in the middle of the road by burying a steel pipe and chain connected to the wire cable. (Tr. 127, 129, 133; App. A7-A9) The wire cable blocking the road at the North entrance was connected to a railroad iron painted purple on one side of the road and connected to a tree on the other side. (Tr. 126, 127, App. A6). Defendants were having constant problems with trespassers on Greenfield. (Tr 124, 125, 198,

201). Trespassers had disconnected the wire cables. Trespassers had shot sign posts off with a shot gun. (Tr. 189) Trespassers had damaged property. (Tr. 196, 137, 191) Trespassers had torn off signs, flags, and jugs from the wire cables. (Tr. 136, 128, 138, 139, 198) Trespassers had shimmed the wire cabled up the trees to drive their trucks under the wire cable. (Tr. 189, 129, 130, 131) Defendants knew that some of the trespassers were riding ATV four-wheelers and three-wheelers on their property. (Tr. 127, 128, 131, 132).

The wire cable blocking the farm road at the South entrance was hard to see. (Tr. 129, 205) The road to the South entrance was among more trees and woods than the North entrance road. (Tr. 53, 54, 126; App. A6-A9) The wire cable at the South entrance was hung across the middle of the farm road-not at the beginning or end of the road. (Tr. 121, 133; App.A6-A9) There were no railroad iron posts or fence posts on the side of the road to suggest that the road was blocked by a wire cable. (Tr. 87, 90, 109, App. A6-A9) Defendants knew the wire cable to the South entrance to Greenfield was a dangerous condition without any warning signs attached. (Tr. 142, 205, 206).

On October 7, 2000, there were no warning signs on the wire cable at the South entrance to Greenfield. (Tr. 68, 87, 107, 108, 109, 154) The wire cable had no markings, flags or anything else to warn of the cable. (Tr. 68, 87, 107, 108, 109, 154)

Plaintiff, Eric Humphrey, drove his ATV four-wheeler into the wire cable without ever seeing the cable. (Tr. 86, 94, 100, 156, 157). Plaintiff was thereby injured. (Appellant has raised issues relating only to liability, and therefore, Respondent, will not set forth the facts relating to his injuries). Plaintiff filed suit against Defendants, Robert Dale Glenn and Charles Glenn, d/b/a C & D Glenn Farms, for his damages resulting from being clotheslined by the wire cable (LF 7-13).

The case was tried and submitted to a Jury on May 23, 2003. (LF 4-5) Plaintiff submitted jury instruction No. 8 (the verdict directing instruction), based upon the Restatement (Second) of Torts Section 335. (Tr. 210, 214, App. A5) Defendants objected to Instruction No. 8 and submitted their objections in writing to the Court. (Tr. 210-214, LF 68-73) The Court overruled Defendants' objection. (Tr. 213) The Jury found in favor of Plaintiff, Eric Humphrey, assessing Defendants percentage of fault at 50% and finding total damages of $100,000.00. (LF 76) The Court entered Judgment in favor of Plaintiff, awarding Plaintiff $50,000.00 in damages from the Defendants per the Jury's verdict. (LF 79-80). The Defendants appealed the Judgment. (LF 117-126)

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN OVERRULING DEFENDANTS' MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF PRESENTED A SUBMISSIBLE CASE UNDER THE RECOGNIZED EXCEPTION TO THE GENERAL RULE IN MISSOURI THAT LANDOWNERS DO NOT OWE A DUTY TO TRESPASSERS FOR CONDITIONS ON THE LAND IN THAT PURSUANT TO RESTATEMENT (SECOND) OF TORTS, SECTION 335, PLAINTIFF CLEARLY SHOWED (1) DEFENDANTS KNEW TRESPASSERS WERE CONSTANTLY INTRUDING UPON THE SOUTH ENTRANCE TO GREENFIELD (2) DEFENDANTS INSTALLED THE WIRE CABLE BLOCKING THE SOUTH ENTRANCE TO GREENFIELD KNOWING THE WIRE CABLE PRESENTED A DANGEROUS CONDITION LIKELY TO CAUSE DEATH OR SERIOUS BODILY HARM TO TRESPASSERS, (3) DEFENDANTS KNEW THE WIRE CABLE WAS OF SUCH A NATURE THAT TRESPASSERS WOULD NOT DISCOVER IT, AND (4) DEFENDANTS FAILED TO EXERCISE REASONABLE CARE TO WARN TRESPASSERS OF THE WIRE CABLE BLOCKING THE SOUTH ENTRANCE TO GREENFIELD.

McVicar v. W. R. Arthur, 312 SW2d 805 (Mo. S. Ct. 1958)

Seward v. Terminal R. R., 854 SW2d 426 (Mo. S. Ct. 1993)

Urban Lucier, Administrator v. Meriden-Wallingford Sand andStone Company, Inc., et al., 153 Conn.422, 216 A. 2d 818 (Conn. S. Ct. 1966)

Wells v. Huhs Realty Co., 269 SW2d 761 (Mo. S. Ct. 1954)

Section 335, Restatement (Second) of Torts

II. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION FOR NEW TRIAL AND IN OVERRULING DEFENDANTS' OBJECTION TO JURY INSTRUCTION NUMBER 8 IN THAT ANY DEFECT IN INSTRUCTION NO. 8 DID NOT (1) MISDIRECT, MISLEAD, OR CONFUSE THE JURY, (2) PREJUDICE THE DEFENDANTS, AND (3) HAD NO SUBSTANTIAL PREJUDICIAL EFFECT ON THE JURY.

Cotner Productions, Inc. v. Snadon, 990 SW2d 92 (Mo. App. S. D. 1999)

Crabb v. Mid-American Dairymen, Inc., 735 SW2d 7114 (Mo. S. Ct. 1987)

Fowler v. Park Corporation, 673 SW2d 749 (Mo. S. Ct. 1984)

Hudson v. Carr, 668 SW2d 68 (Mo. S. Ct. 1084)

Missouri Rules of Civil Procedure 70.02

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN OVERRULING DEFENDANTS'MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF PRESENTED A SUBMISSIBLE CASE UNDER THE RECOGNIZED EXCEPTION TO THE GENERAL RULE IN MISSOURI THAT LANDOWNERS DO NOT OWE A DUTY TO TRESPASSERS FOR CONDITIONS ON THE LAND IN THAT PURSUANT TO RESTATEMENT (SECOND) OF TORTS, SECTION 335, PLAINTIFF CLEARLY SHOWED (1) DEFENDANTS KNEW TRESPASSERS WERE CONSTANTLY INTRUDING UPON THE SOUTH ENTRANCE TO GREENFIELD (2) DEFENDANTS INSTALLED THE WIRE CABLE BLOCKING THE SOUTH ENTRANCE TO GREENFIELD KNOWING THE WIRE CABLE PRESENTED A DANGEROUS CONDITION LIKELY TO CAUSE DEATH OR SERIOUS BODILY HARM TO TRESPASSERS, (3) DEFENDANTS KNEW THE WIRE CABLE WAS OF SUCH A NATURE THAT TRESPASSERS WOULD NOT DISCOVER IT, AND (4) DEFENDANTS FAILED TO EXERCISE REASONABLE CARE TO WARN TRESPASSERS OF THE WIRE CABLE BLOCKING THE SOUTH ENTRANCE TO GREENFIELD.

In Missouri, the general rule is that landowners owe no duty to trespassers for

conditions existing on their land. Paisley v. Liebowits, 347. S.W.2d 178 (Mo. S. Ct. 1961). A trespasser is not denied recovery because of trespassing; recovery is denied because a trespasser's presence is not to be anticipated and consequently, the landowner or possessor of the land has no duty to take precautions for a trespasser's safety. McVicar v. W. R. Arthur and Co., 312 SW2d 805 (Mo. S. Ct. 1958); Stevens v. Missouri Pac. R. R., 355 SW2d 122 (Mo. S. Ct. 1962).

It is also well established that landowners must not use their property as to unnecessarily injure others; consequently, a duty may be imposed by common laws under the circumstances of a given case. Wells v. Huhs Realty Co. 269 SW2d 761 (Mo. S. Ct. 1954). The Courts have adopted an exception for trespassing children pursuant to Section 339, Restatement of Torts. Salanski v. Enright, 452 SW2d 143 (Mo. S. Ct. 1970). The Courts have adopted an exception called "the hard by rule" creating a duty for landowners who maintain an artificial and hazardous condition so close by a public highway that a traveler who inadvertently deviates from the public road may be injured. Wells v. Huhs Realty Co., 269 SW2d 761 (Mo. S. Ct. 1954); Winegardner v. City of St. Louis, 346 SW2d 219 (Mo. S. Ct. 1961). The Courts have recognized, although not formally adopting, the exception contained in Section 335, Restatement (Second) of Torts. Seward v. Terminal R.R., 854 SW2d 426 (Mo. S. Ct. 1993); Politte v. Union Electric Co., 899 SW2d 590 (Mo. App. E. D. 1995);

Mothershead v. Greenbriar Country Club, 994 SW2d 80 (Mo. App. E. D. 1999); Hogate v. American Golf Corporation, 977 SW3d 44 (Mo. App. E. D. 2002); Cochran v. Burger King Corp., 937 SW2d 358 (Mo. App. W. D. 1997); City of Kansas City, Missouri v. New York-Kansas Building Associates, L. P., 96 SW3d 846 (Mo. App. W.D. 2002). All of these exceptions are based on the concept that possessor'sof land owe a duty where harm to a trespasser can be reasonably anticipated, and all of the exceptions are narrowly defined. These exceptions to the general rule are not intended to expand the law and impose a duty onto landowners toward trespassers who cannot be anticipated but rather are intended to uphold the general principle that landowners are not to use their land so as to unnecessarily injury others.

In Seward v. Terminal R. R., the Court was confronted with a trespasser liability question and reasoned: "Unless a trespasser can demonstrate that he falls within one of the clearly defined exceptions to the general rule, a possessor of land is not liable for harm caused by the failure to put his land in a reasonably safe condition." Seward at 428. The Court acknowledged that the exceptions which have developed are based on fact situations where harm to trespassers should reasonably be anticipated by the landowner. Seward at 428. The Court proceeded to set forth the exception contained in Section 335, Restatement (Second) of Torts (1965):

Possessor of land who knows, or from facts within his knowledge

should have known, that trespassers constantly intrude upon a limited area of land, is subject to liability for bodily harm caused to them by an artificial condition, if

(a) The condition:

(1) Is one which the possessor has created or maintains and

(2) Is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and

(3) Is of such a nature that he has reason to believe that such trespassers will not discover it, and

(b) The possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

Seward at 429

The Courts, in all of the above cited cases, explained that the fact situation for each case did not meet the narrowly defined exception set out in Section 335. Consequently, the exception as contained in Section 335 has never been formally adopted or rejected. Seward at 429. However, the facts of this case clearly demonstrate that the Defendants owed a duty of care to trespassers, and the Jury determined that Defendants failed to exercise ordinary or reasonable care in maintaining the wire cable at the South entrance to Greenfield. (LF 76)

Whether the Defendants owed a duty to Plaintiff as a trespasser upon land the Defendants leased, maintained, and controlled was a question of law for the trial court to decide. Boyette v. Trans World Airlines, 954 SW2d 350, 354 (Mo. App. E. D. 1997). The evidence before the trial court clearly indicates that the Defendants not only anticipated the presence of trespassers at the South Entrance to Greenfield, but that Defendants tried to take precautions against trespassers being clotheslined at the South entrance to Greenfield. The trial court did not err in submitting Plaintiffs case to the jury based upon Section 335, Restatement (Second) of Torts (1965).

The record clearly demonstrates that Defendants knew or should have known that trespassers constantly intruded upon the South entrance to Greenfield. Defendant, Robert Dale Glenn, testified that Defendants had "constant problems" with trespassers to Greenfield (Tr. 124). Defendant, Charles Glenn, testified under questioning by defense counsel that trespassers were "constantly" tearing off signs from the wire cable and tearing out the cable; (Tr. 198). Burke Dodson, the owner of the property, testified that trespassers were "constantly" tearing off warning signs from the wire cables. It was clear from the testimony that trespassers were constantly coming onto Greenfield, North and South entrance, and causing problems. The purpose of installing the wire cable at the South entrance to Greenfield was to prevent the trespassers from coming onto the land. (Tr. 202, 26,27, 131, 132).

The record clearly demonstrates that the Defendants installed the wire cable at the South entrance to Greenfield (Tr. 127) and that the Defendants knew the wire cable at the South entrance created a dangerous condition likely to cause death or serious bodily injury. Defendant, Robert Dale Glenn, testified that he knew the wire cable at the South entrance to Greenfield was a dangerous condition. (Tr. 142) Defendant, Robert Dale Glenn, knew that the wire cable was difficult to see. (Tr. 129) Defendant, Robert Dale Glenn, knew that trespassers were riding three-wheelers and four-wheelers on the property (Tr. 127-128) and he knew that the wire cable presented a likelihood of someone getting clotheslined. (Tr. 132). Clearly, someone riding a four-wheeler, who gets clotheslined by this wire cable, is likely to suffer serious bodily injury or death, and in fact, Plaintiff did get clotheslined and suffered severe bodily injury.

The evidence presented to the jury also consisted of photographs of the wire cable at the South entrance to Greenfield. (App. A7-A9) The photographs show a wire cable hung among several trees to each side of the farm road. (App. A7-A8) There are no fence posts, railroad irons (as exists at North entrance), or other artificial condition to suggest that the farm road is being blocked at the location of the wire cable. (App. A7-A8) The photographs alone show a dangerous condition. Any person traveling this road would have difficulty seeing and/or expecting the wire cable to be there. It is almost as if the wire cable was not meant to be seen.

The record clearly demonstrates, as argued above, and by Defendants own testimony that the wire cable was not discoverable by trespassers. Defendant, Robert Dale Glenn, stated that the wire cable "would be hard to see". (Tr. 129) Defendant, Charles Glenn, stated that the reasons for putting warning signs on the wire cable at the South entrance was "to keep people from running up on it". (Tr. 205) Defendants knew that the wire cable was difficult to see, and the wire cable was not discoverable.

The true issue of this case was whether the Defendants exercised ordinary or reasonable care to warn trespassers of the wire cable at the South entrance to Greenfield. Defendants testified that they tried to keep warning devices on the wire cable at the South entrance, but trespassers kept tearing the warnings off. It is clear that no warning devices were on the cable when Plaintiff was clotheslined. (Tr. 68, 87, 107, 108, 109, 154).

Once the trial court determines the Defendants owed Plaintiff a duty of care, whether the Defendants failed to exercise reasonable or ordinary care became a question of fact for the jury to decide. In a jury tried case, an appellate court must examine the evidence presented in the light most favorable to the prevailing party (in this case, the Plaintiff). Haswell v. Liberty Mutual Insurance Co., 557 SW2d 628, 633 (Mo. S. Ct. 1977). Other than attempting to keep warning signs on the wire cable at the South entrance to Greenfield, the Defendants offered no evidence of taking any

other precautions. The Defendants placed a railroad iron post, painted purple, at the side of the road to the North entrance. (App. A6) This post clearly suggests that the road is being blocked. (App. A6) The defendants painted the chain, connecting the wire cable to the ground, purple. (App. A6) These two simple precautions were not taken at the South entrance; had they placed a post at the South entrance it is likely this accident never would have occurred.

Finally, the mere location of the wire cable at the South entrance shows lack of reasonable care. The wire cable is hidden among trees and blocks the farm road neither at the beginning nor the end of the road but somewhere in between. The Defendants placed a wire cable across a farm road at a location that no one would expect a wire cable to be placed, at a location among numerous trees making the wire cable difficult to see, and failed to connect the wire cable to anything other than the natural landscape further hiding the wire cable from view. The Defendants placed the wire cable at a location they knew trespassers constantly intruded upon, and further Defendants knew that trespassers, who were riding four wheelers and three wheelers at this location, would run the risk of being clotheslined. The Defendants testified they tried to warn trespassers by placing warning devices on the wire cable, however, the Defendants knew these warning devices were being torn off.

In Urban Lucier, Administrator v. Meriden-Wallingford Sand and Stone

Company, Inc., et al., 153 Conn. 422, 216 A. 2d 818 (Conn. S. Ct. 1966), the Supreme Court of Connecticut upheld a jury's verdict (based on Section 335) with a very similar fact pattern to this case. In that case a motorcyclist was clotheslined by a wire cable. The facts were stated as follows:

The defendant owned and maintained an unpaved private road which connected Buel Street and Pent Road, two paved public highways in Wallingford, and which served as a means of access for the public to its sand processing plant. The road surface was yellow-brown in color and was graded to a smooth traveling surface for vehicles. At one end the road was a southerly continuation of Buel Street, and , where they joined, both roads were the same width. There was a trailer park on Pent Road, and almost everybody in the park used the defendant's road to get to Buel Street. The defendant arranged a cable barrier across its road 408 feet south from Buel Street. One end of the cable was attached to a tree on the east side of the road and the other to a post on the west side. At this point the road was about twenty-five feet wide and at a down grade from the southerly end of Buel Street. The cable was rusted, dark brown in color and about three-eights of any inch in diameter. Attached to it was a dirty, grimy metal plate, six inches by twelve inches. The roadside brush in the area was also a brown color. The cable at its lowest point sagged to about two feet and two inches above the surface of the road.

To the south of the cable there was a slight rise in the road. During the period in which the defendant's plant was in operation, on a five-ay week from 8 a.m. to 4:30 p.m. the cable was always down and cars would freely pass along the road to and from Pent Road and the defendant's plant. The defendant knew that people used the road as a passway and that is the reason it provided the barrier. The cable was raised across the road by the defendant's employees at the close of each day's work. The only indication of danger or warning sign in the whole area was one eight-by-ten-inch sign reading "Private Property Keep Out". This sign, however, was not on the defendant's land but was attached to a telephone-telegraph pole on the adjoining land of the railroad and was about nine or ten feet to the east of defendant's road. (Lucier at 427-428; 821-822)

The Supreme Court of Connecticut ruled: "*On these facts...the jury could reasonably conclude that the Defendant created and maintained on its premises a condition which in the exercise of due care it should have known would be likely to cause death or serious bodily harm to trespassers when it knew that trespassers used that limited portion of the premises under such circumstances that they would not discover the condition in time to avoid injury. Nevertheless, (Defendant) failed to exercise reasonable care to warn (trespassers) of the existence of the condition and the risk involved.* (Lucier at 429; 822)

In viewing the evidence in a light most favorable to Plaintiff, Defendants' actions were not that of an ordinarily careful person. The Jury agreed and correctly assessed a percentage of fault to the Defendants.

II. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION FOR NEW TRIAL AND IN OVERRULING DEFENDANTS' OBJECTION TO JURY INSTRUCTION NUMBER 8 IN THAT ANY DEFECT IN INSTRUCTION NO. 8 DID NOT (1) MISDIRECT, MISLEAD, OR CONFUSE THE JURY, (2) PREJUDICE THE DEFENDANTS, AND (3) HAD NO SUBSTANTIAL PREJUDICIAL EFFECT ON THE JURY.

Plaintiff submitted Jury Instruction No. 8 based upon the cause of action as stated in Section 335, Restatement (Second) of Torts (1965). (Tr. 212, App. A5) Defendants submitted a written "Objection to Plaintiff's MAI 22.02 (Modified)" during the instruction conference. (Tr. 210-214; LF 68-73; App. A5) Defendants offered no alternative instruction, nor did Defendants request the wording of Plaintiff's Instruction Number 8 to be modified. (Tr. 210-214)

Missouri Supreme Court Rule 70.02 sets forth the requirements for submitting Jury Instructions modifying MAI or not-in-MAI. (App. A1-A2) Specifically, Rule 70.02(b) states "Where an MAI must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI

must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts." The giving of an instruction in violation of Rule 70.02 shall constitute error, the prejudicial effect to be judicially determined. Rule 70.02(c).

Plaintiff's Jury Instruction No. 8 substantially follows the elements contained in Section 335, Restatement (Second) of Torts (1965). (App. A5) Instruction No. 8 begins "Your verdict must be for Plaintiff if you believe: First, Defendants knew or should have known that trespassers frequently intruded upon the South entrance to Greenfield..." (LF 64; App A5) Section 335, Restatement (Second) of Torts, states "A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land..." (App. A3-A4) Plaintiff admits that Instruction Number 8 contains a technical defect in that the Instruction uses the word "frequently" while Section 335 uses the word "constantly". However, the Defendants were not prejudiced by the defect because the fact that trespassers were constantly upon the South entrance to Greenfield was not a contested issue at trial.

In Missouri, it has been held many times that the Court will not reverse for instructional error unless prejudice is demonstrated. Crabb v. Mis-American Dairymen, Inc., 735 SW2d 714, 718 (Mo. S. Ct. 1987); Hudson v. Carr, 668 SW2d

68 (Mo. S. Ct. 1984). To reverse on grounds of instructional error, the offending instruction must have misdirected, misled, or confused the jury, and the burden to show this rests on the party challenging the instruction. Cotner Productions, Inc. v. Snadon, 990 SW2d 92, 99 (Mo. App. S. D. 1999).

In order for Defendants to prevail on the challenged Instruction Number 8, the Defendants must show the Jury was "misdirected, misled, or confused" by the use of the word "frequently" instead of the word "constantly". The Defendants theory at trial was that they acted appropriately in maintaining and warning trespassers of the wire cable at the South entrance to Greenfield. Defendants acknowledged "constant" problems with trespassers at the South entrance to Greenfield. It was because of this "constant" problem that the Defendants installed the wire cable at the South entrance to Greenfield. The use of the word "frequently" instead of "constantly" did not prejudice the Defendants.

To further illustrate that this was not an issue, defense counsel states in his closing argument "Now, we talk about Instruction Number 8, which Mr. Thornton talked about. First he says, the Judge tells you Defendant knew or should have know of trespassers, intruders upon the South entrance of Greenfield. They intruded all over. They made every effort under the sun, short of putting a guard down there to keep them off." (Tr. 222, 223) It was never testified to nor argued that Defendants

didn't know trespassers were coming onto the South entrance to Greenfield.

In Fowler v. Park Corporation, 673 SW2d 749 (Mo. S. Ct. 1984), the Court was presented with a Jury Instruction which defined negligence as failure to use care that a "very careful and prudent person" would use. The proper instruction should have stated care that an "ordinarily careful and prudent person" would use. The Court determined that the instruction was in error, but refused to reverse because the error had no substantial prejudicial effect on the jury. The Court concluded: "We doubt very much that the variation in a single word was a circumstance which had a substantial effect on the Jury". Fowler at 755.

The variation in the use of "frequently" instead of "constantly" in this case had absolutely no effect on the jury. The Defendants admitted there were constant problems with trespassers at the South entrance to Greenfield. The Defendants never contested the fact that trespassers were constantly upon their property and specifically Greenfield. The Defendants even suggested that other trespassers were at fault for Plaintiff being clotheslined. (Tr. 140). In Cotner Productions, Inc., (supra), the Court refused to reverse a Jury verdict based on an instructional error concerning facts where "there was no real dispute". Cotner Productions, Inc. at 99.

CONCLUSION

Plaintiff/Respondent, Eric Humphrey, respectfully submits that the rulings of the Trial Court, the Jury's verdict and the Judgment therefrom be affirmed for the reasons argued herein.

THORNTON LAW FIRM
Attorneys for Plaintiff/Respondent
113 West North Street, P. O. Box 40
Sikeston, MO 63801
Telephone: (573) 471-1207

By:_____
FRED H. THORNTON, III #43315

RULE 84.06(c) CERTIFICATE OF COMPLIANCE

Fred H. Thornton, III, counsel for Respondent, pursuant to Rule 84.06(c) hereby certifies to this Court that:

1. The brief filed herein on behalf of Respondent contains the information required by Rule 55.03.

2. The brief complies with the format requirements of Rule 84.06 (a) and (b).

3. The font is Times New Roman, proportional spacing, 14 point type.

4. The number of the words in this brief, according to the word processing system used to prepare the brief is 4882, exclusive of the cover, certificate of service, this certificate, the signature block and the appendix.

5. In compliance with Rule 84.06(g) a floppy disk is filed with the brief that complies with Rule 84.06 (g) and said disk has been scanned for viruses and, according to the program used to scan for viruses, the disk is virus-free.

THORNTON LAW FIRM
Attorneys for Plaintiff/Respondent
113 West North Street, P. O. Box 40
Sikeston, MO 63801
Telephone: (573) 471-1207

Facsimile: (573) 471-1050

By:_____
FRED H. THORNTON, III #43315

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of Respondent's Substitute Brief and one (1) floppy disk was served upon the following attorney of record by sending same by U. S. mail, first class postage prepaid, this 5th day of August, 2004:

Mr. Albert C. Lowes
Lowes & Drusch
2913 Independence
Cape Girardeau, MO 63703-8320

THORNTON LAW FIRM
Attorneys for Plaintiff/Respondent
113 West North Street, P. O. Box 40
Sikeston, MO 63801
Telephone: (573) 471-1207

By:_____
FRED H. THORNTON, III #43315

APPENDIX

Table of Contents